webserver@yucca-web.ymp.gov on 01/10/2008 03:19:49 PM

RRR000121

To: EIS_Comments@ymp.gov
cc:
Subject: EIS Comment

User Filed as: Not Categorized in ERMS

January 10, 2008 15:19:49

IP address: 69.19.14.21

~~~~~~

The Commentors Name:
---> Mr. Ian Zabarte

~~~~~~

The Commentors Address:
---> 7231 S. Eastern Avenue, Box 107
---> Las Vegas, Nevada 89119

~~~~~~

Email Information:
---> mrizabarte@bigfoot.com
---> Add commentor to the mailing list : no

~~~~~~

Contact Information:
---> fax number :
---> phone number :
---> organization : Western Shoshone National Council
---> position :

~~~~~~

Comment Text :
-->

Comments of the

Western Shoshone National Council

On Review of

The United States Department of Energy

Supplemental Environmental Impact Statement

For A Geologic Repository for the Disposal of

Spent Nuclear Fuel and High-Level Radioactive Waste at Yucca Mountain

And

The Draft Environmental Impact Statement

For

A Rail Alignment For The Construction and
~~~~~~

Operation of A Railroad in Nevada

To A Geologic Repository At

Yucca Mountain, Nye County, Nevada

January 10, 2008

Western Shoshone National Council
7231 S. Eastern Avenue, Box 107
Las Vegas, NV 89119

INTRODUCTION

These comments are provided by the Western Shoshone National Council (WSNC), government of Newe Sogobia (Newe is the Western Shoshone people and Sogobia is the Western Shoshone homeland), as a supplement to oral comments provided on December 3, 2007 in Las Vegas, Nevada and December 5, 2007 in Washington, DC. These comments review the US Department of Energy Supplemental Environmental Impact Statement for a Geologic Repository for the Disposal of Spent Nuclear Fuel and High-Level Radioactive Waste at Yucca Mountain (Repository SEIS) and the Draft Environmental Impact Statement for a Rail Alignment for the Construction and Operation of a Railroad in Nevada to a Geologic Repository at Yucca Mountain, Nye County, Nevada (Rail Alignment EIS) to be included in the official record.

1 The approach used herein will provide a land ownership perspective of the WSNC challenging the ownership assumptions to Yucca Mountain contained in the Repository SEIS and the associated Rail Alignment corridor. Proceeding with a tribally appropriate cultural perspective that includes land ownership provides a clearer understanding of the high sense of responsibility for the land possessed by Western Shoshone nationals and the responsibility of the WSNC to protect the property rights of it's citizen. By identifying the extant land rights of the Western Shoshone people a clearer understanding of risks to Native Americans can be assessed.

BACKGROUND

The WSNC is the government de jure with complete sovereignty exercising full powers of self-government for the protection of the collective and individual rights and titles of Western Shoshone nationals. The government of Newe Sogobia has ruled in an unbroken line of succession from time immemorial. Continuity is the dominant concept of tribal property rights and other fundamental rights and liberties. The custom of Newe Sogobia derives its force and authority from the universal consent and immemorial practice of the people. The source of law is the inherent sovereign right of each tribal individual endowed by the Creator, then delegated to the Chief and Principle Men in council to exercise collectively on behalf of the people. There is no separation of religion from the government established by the people.

For thousands of years the Western Shoshone have been a land-centered people

living a culture of land ownership. Land ownership rights and responsibilities have always been a stabilizing factor of community in sense of place, memories and of bonds uniting the Western Shoshone people to the soil. Land use over millennia provided social and economic benefit developing a culture of land ownership.

Newe Sogobia's entry and commitment to International Law began by laying down arms and guaranteeing "peace and friendship" in 1863 by treaty relations with the US that emanates from International Law. The firm configuration of the boundaries of Newe Sogobia are identified in Article V of the 1863 Treaty of Ruby Valley (18 US Statute 689-693) and furnishes the WSNC with a formally recognized setting for the exercise of its power and at least relative recognition of the coexistence beyond these boundaries of the US exercising similar powers. Specific rights were granted to the US for rights-of-way and access for specific purposes. The US agreed to pay for the rights sought and damage done to the property interests disturbed in Article VII. WSNC exercise of sovereign power over Newe Sogobia was acknowledged and guaranteed for the safety of foreigners under Article II.

Since the signing of the treaty a long simmering warm dispute between the government of Newe Sogobia and the US has existed over competition for land. A subtle violence of economic interests and even well intentioned initiatives coming from the US undermine Western Shoshone tribal life-ways and self-government stability. Gradual encroachment and the application of federal land laws extraterritorially by the US condone racism rather than justice and marginalize Western Shoshone nationals.

An effort by the US to end the dispute in 1946 resulted in the creation the Indian Claims Commission to identify tribal groups, determine lands taken and provide payment for lands "taken". In the Case of the Western Shoshone no taking had occurred. A report prepared by the WSNC in 2003 highlights the failure of the ICC to achieve its statutory mandate (ATTACHMENT II). The report finds that:

The Final Report of the ICC tells us for a certainty that the Indian Claims Commission failed to fulfill the reporting requirement of Section 22(a) of the Indian Claims Commission Act in the Western Shoshone case. Section 22(a) of the ICC Act specified the two ingredients necessary for the Indian Claims Commission to reach "finality" in any given case. One ingredient was the Commission's report of its final determination and judgment to Congress. The second ingredient was payment to the Indians of the compensation owed to them. The United States Supreme Court in the 1985 ruling U.S. v. Dann failed to discover that the ICC had never been able to fulfill the first reporting ingredient of "finality" in the Western Shoshone case, thus resulting in an error of fact in the decision.

The United States government has relied on the ruling in U.S. v. Dann to contend that the Western Shoshone are barred from raising the question of Western Shoshone title because of the ruling in U.S. v. Dann that the Western Shoshone were paid when the U.S. government paid itself on their behalf. However, such "finality" could only be reached in the Western Shoshone case if the Indian Claims Commission actually did file its report with Congress in the Western Shoshone case, and if the Western Shoshone were paid. Because the Indian Claims Commission no longer exists, the reporting requirement of the ICC Act will forever remain unfulfilled by the Indian Claims Commission.

Extant Western Shoshone property rights antedated and survive the US forced claim to Newe Sogobia following the legal tradition of continuity. For example, property rights are presumed to continue until there is something that takes them away. All rights and liberties are of that fundamental nature. Newe Sogobia can only be got and held by discrimination of race and the misuse

of US policy for political exclusion.

ENVIRONMENTAL RACISM

2 The DOE has not addressed impacts of a geologic repository at Yucca Mountain to property interests of the Western Shoshone people. There is no prohibition against considering potential impacts to Newe Sogobia, only lack of will on the part of the DOE to consider the possibility of extant property ownership rights of the Western Shoshone people and the impact of loss of land rights to tribal society.

In the DOE Yucca Mountain site characterization process the DOE failed to identify Western Shoshone people as they actually exist and instead orchestrated events for the benefit of developing Yucca Mountain. The Repository SEIS reflects the selective inattention of the DOE in spite of efforts by the WSNC since at least 1985 to have tribal land ownership rights considered in the Yucca Mountain site characterization process. Focusing exclusively on cultural resource studies, DOE anthropologists from the University of Michigan, Institute for Social Research considered site-specific repository development concerns determined by the DOE. The anthropologists bent reality to match theory and DOE development goals, disrupting Western Shoshone living culture and violating the human rights of those they study. The DOE cultural study produced "cultural triage" that forced the whole of Newe Sogobia into a funnel of cultural anthropology. The process produced the cultural destruction of Newe Sogobia for the benefit of the nuclear industry and the US government, effecting developmental genocide.

3 What did not fit into the cultural study was deemed nonexistent and therefore not suitable for consideration by any means. This selective inattention produced outcomes that favored the DOE's Yucca Mountain development objectives. For example, an examination of legal systems, property ownership and territorial sovereignty were not suitable yet, are the basis for continuing tribal custom, social cohesiveness and economic stability of Newe Sogobia. Erroneous assumptions of land ownership at Yucca Mountain by the DOE impact tribal society. Such neglect reflects an act of intent making tribal survival more difficult, restricting tribal ways of life, and strangling values tribal culture is built upon.

SUMMARY

4 Large uncertainties color the perception of the Western Shoshone people toward nuclear issues. Potential threats must be assessed from a tribally appropriate perspective that views property ownership of Yucca Mountain and the Rail Alignment Corridor within the Treaty of Ruby Valley boundaries as being vested in the Western Shoshone people. The use of a solely US perspective focusing on programs upon which progress of commercial nuclear technology depends is racial discrimination now commonly known as environmental racism.

The use of "cultural triage" in the selection and development of Yucca Mountain effects developmental genocide. The use of subcontractors by the DOE imply impunity from sanction. Subcontractors defuse and confuse responsibility for the acts violating tribal life-ways and shelter the DOE from immediate identification and long term risks. Subcontractors act as a mask and shield to cover for activities not otherwise conducted or preformed by persons acting in official DOE capacity.

Additional potential adverse impacts and concerns of the WSNC not addressed from a culturally appropriate tribal perspective in the Repository SEIS and the Rail Alignment EIS include: . . .

5 1. Violation of Western Shoshone territorial sovereignty from

trespass by the US in development of Yucca Mountain as a high-level radioactive waste repository;

2. Violation of Western Shoshone territorial sovereignty and treaty through trespass by the US in development of a Rail Alignment corridor to Yucca Mountain;

6 3. Disruption of foreign relations between Newe Sogobia results when treaty violations by US occur;

4. Impact to foreign relations with Goshute tribe over transportation and storage of waste at private fuel storage facility in transportation aging and disposal canisters;

7 5. Environmental racism results by the effort of the US to bring commercial nuclear reactor waste to Newe Sogobia, targeting the Western Shoshone people's land;

8 6. Violation of the WSNC Nuclear Free Zone Resolution 01-WSNC-95;

9 7. The DOE effort to site a repository at Yucca Mountain takes land and cultural resources out of use by the Western Shoshone people;

10 8. Impact of diminished capacity in self-government results from the deployment of limited human and technical resources from normal day-to-day affairs to unfunded monitoring and response to DOE characterization and licensing activity;

11 9. Cumulative impacts result from additional burdens created when Western Shoshone land use is further reduced, plant resources are diminished, non-Native American presence increases and additional Western Shoshone cultural resources are disturbed or removed.

12 10. Ethnic identity of the Western Shoshone people in land is diminished;

13 11. Additional impact results when culturally appropriate mitigation is not taken or positive benefit made to Western Shoshone victims to offset impacts.

14 12. Adverse psychological impacts related to stigma or "special effects" in accidents in transportation or operation of a repository within Newe Sogobia;

13. Cumulative psychological impacts from transportation or operation accident. Individual psychological fear and anxiety that combine in tribal community to become greater than they were individually - synergistic effects;

15 14. Racially disproportionate burden of risk - no positive benefit for tribal community and all the risk;

11 Con't 15. Cumulative and synergistic adverse impact on Native American health and tribal environment;

16 16. Failure to conduct tribal and ecological health risk assessment;

17 17. Impacts to lands held in trust for the tribe that may be damaged by transportation accident or an accident at the proposed Yucca Mountain site;

18. Impacts to land outside the reservation boundaries arising from a congressionally ratified treaty may be damaged by transportation accident or an accident at the proposed Yucca Mountain site;

19. Impact to extant cultural relationship to land outside of the reservation boundaries that may be removed from use and access by transportation accident or accident at the proposed Yucca Mountain site;

10 Con't 20. Impacts to tribal fiscal balances from the need to review and respond to DOE documents without additional funding;

14 Con't 21. Impacts to sustainable tribal economic development may result from stigma related to the designation of transportation route through the reservation;

18 22. Impacts to quality of life factors that make the community vulnerable to transportation accidents;

10 Con't 23. Impacts to services such as law enforcement from the lack of training or emergency preparedness equipment;

24. Impacts to self-governance and tribal administration of the tribe from failure of institutional capacity to deal with repository related demands;

19 25. Impacts to the government-to-government relationship between the

tribe and the federal government being further strained over conflict in ownership of the Yucca Mountain site;]

17 Cont 26. [Impacts to lands held in trust for tribe that may be damaged or made uninhabitable by a transportation accident or accident at the proposed Yucca Mountain site;]

20 27. [Impacts to access of land outside of reservation boundaries which are secured to under the 1863 Treaty of Ruby Valley that may be damaged or otherwise removed from use by tribal members by radioactive contamination;]

21 28. [Impacts to the tribe's cultural relationship to lands outside of the reservations boundaries that may be removed from tribal use and access by transportation route designation and construction;]

10 con't 29. [Impacts to tribal fiscal balances by the need to respond to DOE documents, reports and participation in licensing proceedings without additional funding;]

22 30. [Impacts to water resources from potential radioactive releases;]

14 con't 31. [Impacts to potentially returning tribal members from fears of nuclear waste transportation accidents or accidents at the proposed Yucca Mountain site;]

23 32. [Impacts to sustainable tribal economic development, future economic development opportunities, reservation expansion contemplated by Article VII of the Treaty of Ruby Valley, [grazing rights from accidental radioactive release in transportation to the proposed repository or at the proposed Yucca Mountain site;] 24

25 33. [Damage to animal habitat from construction of a transportation corridor near the reservation on treaty lands or by an accident in transportation to or at the proposed repository site;]

20 Con't 34. [Damage to resources used by tribal members such as wood, grasses, pinion nuts, plant for food and medicinal uses by radiation exposure;]

17 Con't 35. [Damage to the health of tribal members from possible exposure to radiation through exposure pathways unique to tribal lifestyle from an accidental release in transportation or at the proposed Yucca Mountain site;]

24 Con't 36. [Damage to grazing range utilized by the tribe's cattle operation resulting in damage to the ranching economy of the tribe as contemplated in Article VI of the Treaty of Ruby Valley;]

23 Con't 37. [Impacts to self-governance from migration of population away from possible transportation route resulting in lower population base to justify required services;]

10 Con't 38. [Impact related to stigma of of-reservation population unwilling to relocate to tribal lands;]

17 Con't 39. [Involuntary tribal community risk from radiological accident in transportation of nuclear waste by highway or rail.]

14 Con't 40. [Stigma affecting community confidence in environment resulting in migration out of community;

41. Loss in confidence by community members in the environment's ability to sustain the needs of the people;]

20 con't 42. [Adverse health effects from exposure to radiation through exposure pathways unique to Native Americans lifestyle;]

25 Con't 43. [Damage to animal habitat including migratory game birds and wild horses from construction of a transportation corridor near the reservation, within the tribes treaty lands, or by an accident in transportation to or at the proposed repository site;]

1 Con't 44. [Under 10 CFR 63 Land Ownership and Control the DOE is required to have ownership, jurisdiction and control of interest in land used as a repository (§ 63.121). No such authority exists to transfer land ownership and jurisdiction vested in the Newe Sogobia to the US and, the ICC process claimed in the Repository SEIS to have done so was not completed (see ATTACHMENT I).]

ATTACHMENT I

Failure of the United States Indian Claims Commission
to File a Report with Congress

in the Western Shoshone Case (Docket 326-K),
Pursuant to Sections 21 and 22(a) of the Indian Claims Commission Act

A Report

Prepared on Behalf of the Western Shoshone National Council

by

Steven Newcomb, Director
Indigenous Law Institute
(Eugene, Oregon)

and

Indigenous Law Research Coordinator
D-Q University at Sycuan
at the Sycuan Band of the Kumeyaay Nation
(El Cajon, California)

January 2003

Summary

Information has recently come to light that raises a fundamental question with regard to the Indian Claims Commission Western Shoshone Docket 326-K.

Section 21 of the Indian Claims Commission Act (ICCA) required the Indian Claims Commission to promptly file a report with Congress when it completed a given case. However, the Commission never carried out this legislative requirement in the Western Shoshone case.

Thus, the statutory basis for a Western Shoshone monetary distribution of Docket 326-K now stands challenged by the failure of the Indian Claims Commission to fulfill its obligations in the Western Shoshone case, as required by the very statute that brought the Commission into existence.

This new finding calls into question the basis of Senate bill 958 (sponsored by Senators Reid and Ensign), and H.R. 2851 (sponsored by Congressman Gibbons)

that would distribute nearly $140 million to the Western Shoshone Indians, as compensation for Western Shoshone lands supposedly taken by the United States without the consent of the Western Shoshone people.

Background

On August 13, 1946, President Truman signed into law the United States Indian Claims Commission Act. The stated purpose of the legislation was to provide American Indians with an opportunity to sue the federal government of the United States for monetary compensation for Indian lands wrongfully taken by the United States at some time in the past. At the time, the U.S. government estimated that there were some $3 billion dollars in potential Indian claims against the United States. (Officials in the Justice Department bragged that they had been able to throw out some 98% of the claims brought by Indians against the United States).

Because American Indians were not citizens of the United States prior to the Indian Citizenship Act of 1924, Indians were not allowed to sue the U.S. government in the U.S. Court of Claims. Before the Indian Claims Commission Act was signed into law in 1946, any Indian people that wanted to sue the United States had to go to Congress and petition for passage of a special jurisdictional act that would give them permission to sue the United States on a one time limited basis. This process was a problem for Indians as well as for the United States government.

Eventually, officials in the United States government (members of the House and Senate of the Congress, and officials of the Department of the Interior and the Department of Justice) agreed that a more systematic approach would be needed in order to put an end to Indian claims against the United States. It was decided that a Commission was needed that would take the burden off Congress by sifting through and investigating any Indian claims against the U.S., and deciding which claims had merit and which did not. It was decided that a specific deadline would be set up, and Indians would have to come forward and make a claim against the United States government by that deadline.

The Traditional Western Shoshone

On October 1, 1863, U.S. treaty commissioners signed a treaty of peace and friendship with eleven "Chiefs, Principal Men, and Warriors of the Western Bands of the Shoshone Nation." The Treaty of Ruby Valley was later ratified by the Senate of the United States in 1869, thereby making it "the supreme Law of the land," pursuant to Article VI of the U.S. Constitution.

The Ruby Valley treaty specified that whites could cross through Western Shoshone territory, build railroads, establish telegraph lines, set up ranches, and form mines within the Western Shoshone country.

The Treaty of Ruby Valley, however, was not a treaty of cession. That is, the Western Shoshone did not cede their lands to the United States by the terms of the Ruby Valley Treaty.

As the generations passed, the Western Shoshone elders continued to invoke the Ruby Valley Treaty's recognition of the boundaries of their ancestral lands. These traditional elders, particularly Muchach Temoak—the grandson of treaty signer, Chief Temoak—were willing to acknowledge that the Western Shoshone had conceded certain rights-of-way and easements to the United States and to white settlers. But these same traditional Western Shoshone leaders were also protective of Western Shoshone land rights and their traditional way of life. As authors Lieder and Page state in the book Wild Justice: The People of Geronimo vs. the United States (1997), "Few tribes in the continental United

States have been as little disrupted by Anglo-Americans as the Western Shoshones" (p. 189).

In 1934, the United States established the Indian Reorganization Act (IRA), which allowed Indian communities to establish a corporate style tribal council government. A relatively small group of Western Shoshone people decided to establish an IRA style government system known as the Te-Moak Bands Tribe. The Indian Claims Commission notified the Western Shoshone IRA system of the opportunity to file a claim against the United States. The traditional Western Shoshone, however, were never formally notified of the Indian Claims Commission process.

Wilkinson, Cragun, and Barker

After the Indian Claims Commission Act was passed, the law firm Wilkinson, Cragun, and Barker approached the IRA Western Shoshone Temoak Bands Tribe and encouraged the Tribe to filed a claim with the ICC as "the Western Shoshone identifiable group." In 1951 Wilkinson, Cragun, and Barker filed a claim on behalf of the Western Shoshone identifiable group, and the process began.

On October 16, 1962, the Indian Claims Commission issued a 30 page "Findings of Fact" having to do with Shoshone Indians generally. Only some 36 sentences of this "Findings" document had to do specifically with the Western Shoshone Indians.

Section 26 of this report reads:

> The Commission further finds that the Goshute Tribe and the Western Shoshone identifiable group exclusively used and occupied their respective territories as described in Findings 22 and 23 (except the Western Shoshone lands in the present State of California) until by gradual encroachment by whites, settlers and others, and the acquisition, disposition, or taking of their lands by the United States for its own use and benefit, or the use and benefit of its citizens, the way of life of these Indians was disrupted and they were deprived of their lands. For these reasons the Commission may not now definitely set the date of acquisition of these lands by the United States. The Commission, however, finds that the United States, without payment of compensation, acquired, controlled, or treated these lands of the Goshute Tribe and the Western Shoshone group as public lands from date or dates long ago prior to this action to be hereinafter determined upon further proof unless the parties may agree upon a date (11 Ind. Cl. Comm. 416)

Importantly, in the 30 pages of the ICC's "Findings of Fact" that served as the basis of the above statement, there is not one piece of historical information to support the Commission's claim of the "acquisition, disposition, or taking" of Western Shoshone lands by the United States. This is why the Commission also said, "For these reasons the Commission may not now definitely set the date of acquisition of these lands by the Untied States."

As Lieder and Page explain:

> …Robert Barker, the attorney at Wilkinson, Cragun, and Barker in charge of the case, argued that all the Western Shoshones' lands had been taken. He didn't attempt to identify the dates of taking, an issue that, he believed, should be reserved for future proceedings. The government contented itself with arguing that the Shoshones had not met the requirements for proving aboriginal ownership and 'the United States could not take from them [the Western Shoshone] what they did not have.' Neither party introduced any evidence on the taking issue or analyzed the possibility that much of the land had never been taken. Apparently, Associate Commissioner Holt, who in 1962 delivered the Commission's opinion in the liability stage of the case, did not consider that possibility either. Rather, the Commission determined the extent of the Western Shoshones' aboriginal territory and concluded they were deprived of that land by the gradual encroachment of non-Indians and the gradual disposition of the land by the [federal] government. Identifying the crucial date when all these lands were magically transformed into a taking was left for future proceedings, which proved unnecessary. (Wild Justice: The People of Geronimo vs. the United States, p. 191)

The ICC was unable to "set the date of acquisition" because the Commissioners were going on the basis of their own personal conjecture and their historically unfounded assumption that the Western Shoshone lands had been taken from the Western Shoshone Indians.

It was as if the Commission were saying in its "Findings of Fact," "We know that the Western Shoshone lands were acquired, disposed of, or taken by the United States, we just don't know precisely when this occurred." Thus, the ICC "Findings" document said that "further proof" would be necessary "unless the parties" (the U.S. attorneys and the attorneys for the Indians) "may agree upon a date" when the alleged taking occurred. In other words, the Commission would need no historical documentation to support its "Findings" if the attorneys could come up with a gentleman's agreement or stipulation as to a date of "taking."

Had the Commissioners used historical documentation to come up with their "Findings" regarding the supposed taking of Western Shoshone lands by the United States, they would have made that historical documentation part of the record. They did not do so.

Indeed, in Temoak Band of Western Shoshone Indians, Nevada v. U.S. (593 F. 2d 994 (1979)), the Court of Claims admitted that the Western Shoshone case

> is one of many where the Commission was unable to discover any formal extinguishment of Indians' legal title, only gradual encroachment by settlers and others, and takings, the exact date of which could not be definitely set. (p. 996)

In an "Interlocutory Order" dated October 16, 1962, the Indian Claims Commission stated in part:

> That the Western Shoshone identifiable group exclusively used and occupied the lands described in Finding of Fact 23; that the Indian title to such of the lands of the Western Shoshone group as are located in the present State of California was extinguished on March 3, 1853; and that as to the remainder of the lands of the Western

> Shoshone, Indian title was extinguished by the gradual encroachment by whites, settlers and others, and the acquisition, disposition or taking of said lands by the Untied States for its own use and benefit, or the use and benefit of its citizens.

The "Interlocutory Order" concluded:

> IT IS THEREFORE ORDERED that the case proceed for the purpose of determining the acreage in each of the four areas involved; the consider-ation paid, if any; the dates of acquisition where necessary; and the market values thereof on the dates of acquisition.

Thus, instead of looking at the historical record and pinpointing specific actions on the part of the United States (or, say, white settlers) when the Western Shoshone lands were purportedly acquired, disposed of, or taken, the ICC decided to allow the attorneys of record to agree by stipulation upon a date acceptable to both parties. However, it is always important to keep in mind that the non-Indian attorneys of the firm Wilkinson, Cragun, and Barker, were the one's who made this stipulation with the U.S. attorneys. The Western Shoshone Indians themselves were not directly involved in the process leading up to the stipulation.

In an ICC document "Opinion of the Commission, dated October 11, 1972, the Commission described the stipulation as follows:

> By order of February 11, 1966, the Commission approved a joint stipulation of the plaintiffs and the defendant (U.S.) in Docket Nos. 326 and 367 as to the date of valuation of Western Shohsone lands. The stipulation provides:
>
> Counsel for both parties, having reviewed pertinent information relating to the time as of which the Western Shoshones lands in Nevada (Indian Claims Commission Finding No. 23) should be valued, hereby stipulate that the Nevada portion of the Western Shoshone lands in dockets 326 and 367 shall be valued as of July 1, 1872. (29 Ind. Cl. Comm. 7)

The abovementioned "order" of the Commission approving a joint stipulation is not available in the microfiche records of the Indian Claims Commission proceedings. Additionally, there is nothing in the record that indicates any specific "pertinent information" that had been reviewed by the non-Indian attorneys who came up with the stipulation.

Attempted Western Shoshone Intervention to Stop the Proceedings

In the 1960's, a group of traditional Western Shoshone formed the Western Shoshone Legal Defense and Education Association. In 1974, this organization attempted to intervene in the Indian Claims Commission proceedings pertaining to the Western Shoshone. The Western Shoshone interveners appealed to the ICC to exclude any unsettled Western Shoshone lands from the claim filed by Wilkinson, Cragun, and Barker in 1951. The Western Shoshone Legal Defense and Educational Association argued that all such unsettled Western Shoshone lands

had never been taken by the United States, and, therefore, still rightfully belonged to the Western Shoshone.

For its part, the IRA Te-Moak Bands Tribe—led by attorney Robert Barker—opposed the legal action by the Western Shoshone Legal Defense and Education Association.

In 1975, the Indian Claims Commission ruled that the Western Shoshone opponents of the ICC proceedings had waited too long to file their petition. The ICC said that the Western Shoshone opponents could not stop or change the course of the proceedings unless they could prove that the process had been tainted by fraud, collusion, or laches. The Commission said that it found no such evidence and denied the Western Shoshone intervention.

Soon after the ICC's ruling against them, the Western Shoshone opponents of the ICC proceedings won political control of the Te-Moak Bands Tribe through a new election. In November 1976, the new leadership of the Te-Moak Bands Tribe fired Robert Barker as the attorney of record in the ICC proceedings. (Notably, the Bureau of Indian Affairs ruled that the Te-Moak Bands Tribe was not permitted to fire Barker).

With new legal representation, the Te-Moak Bands Tribal Council asked the Indian Claims Commission to suspend further proceedings in the case until the traditional Western Shoshone could attempt to enter negotiations with the United States government. The Commission refused to temporarily suspend its proceedings in the Western Shoshone case.

On August 15, 1977, the ICC handed down its "Opinion of the Commission" and "Final Award" in the Western Shoshone case. (40 Ind. Cl. Comm. 318, 453) And in December 1979, the Court of Claims reported the final award of $26 million for the "taking" of Western Shoshone lands.

On July 26, 1980, the Bureau of Indian Affairs, as part of its effort to develop a monetary distribution plan, held a hearing of record in Western Shoshone country. Over 80% of the Western Shoshones who testified (many of whom spoke in Shoshone) opposed the monetary distribution, denounced the Indian Claims Commission claim, and called for the Western Shoshone Nation to refuse the monetary award.

During this hearing of record, a Western Shoshone elder asked the specific question of the federal hearing officer, "By what law did the United States acquire Western Shoshone territory?" The hearing officer, Interior Solicitor Bruce McConkie, had no answer to this question, and remained mute. The elder then said, "Keep your money until you can answer the question of how the U.S. acquired Western Shoshone territory. I reject the award." Thereafter each Western Shoshone person who testified asked the same question of the hearing officer, and when he couldn't answer the question, also rejected the claim.

Because of such massive Western Shoshone opposition to the monetary award (also based in large part on the argument that "Mother Earth is not for sale"), it became readily apparent to the BIA that it would not be able to complete a distribution plan within the six months required by the Indian Tribal Judgment Funds Use or Distribution Act (Pub.L. 93-134, section 1, October 19, 1973). The BIA asked the Senate Select Committee on Indian Affairs for an extension, but the Committee turned down the request.

Failure of the Indian Claims Commission to File a Report with Congress

On September 30, 1978, Congress dissolved the Indian Claims Commission. In 1979 the ICC's "Final Report" to Congress was published. This report includes a chart on page 125: "Fiscal Year Totals of Dockets Completed and Awards." In

footnote that accompanies the chart, we find the Commission's acknowledgment ıat out of the 324 dockets shown as completed by awards, 20 of these dockets ;re "not reported to Congress as completed." (emphasis added). This same ıformation is also found H.D. Rosenthal's Their Day in Court: A History of ne Indian Claims Commission (1990), n pages 266-67).

Western Shoshone docket 326-K is listed in the ICC's "Final Report" as one of :he dockets "not reported to Congress" because the case was still on appeals (by both the U.S. government and the traditional Western Shoshone) before the Court of Claims when the Indian Claims Commission went out of existence.

Although the ICC issued a Final Award judgment in the Western Shoshone case, this did not end its statutory responsibility in the case. The Commission was still required to file its report with Congress. This requirement is spelled out in Section 21 of the Indian Claims Commission Act, "Report of Commission to Congress," which reads as follows:

> Sec. 21. In each claim, after the proceedings have been finally concluded, the Commission shall promptly submit its report to Congress. The report to Congress shall contain 1) the final determination of the Commission; 2) a transcript of the proceedings or judgment Upon review, if any, with the instructions of the Court of Claims; and 3) a statement of how each Commissioner voted upon the final determination of the claim.

Based on Section 21 of the ICC Act, the Indian Claims Commission had a clear and explicit statutory obligation to file a final report with Congress in the Western Shoshone case. Because the Commission failed to do so, finality was never achieved in the Western Shoshone case pursuant to the terms of the ICC Act.

Section 22 of the ICC Act explains the "Effect of Final Determination of Commission."

> Sec. 22. (a) When the report of the Commission determining any Claimant to be entitled to recover has been filed with Congress, such report shall have the effect of a final judgment of the Court of Claims, and there is hereby authorized to be appropriated such sums as are necessary to pay the final determination of the Commission. (emphasis added).

Section 21 is wrapped up inside Section 22(a) of the Indian Claims Commission Act. In other words, Section 22(a) rests on the statutory requirement that the Commission file its report with Congress when it completed any given case.

This point was noted by the Court of Claims in a 1979 decision (Temoak Band of Western Shoshone Indians, 219 Ct. Cl. 346). The Court of Claims said quite clearly:

> [in a previous ruling] we pointed out that by Section 22 of Act, 25 U.S.C. Section 70u, the United States would not be discharged of any claim, including one that the Western Shoshones owned the land, until the judgment was reported to Congress, money to pay it appropriated, and payment made. (352) (emphasis added).

Thus, according to the Court of Claims, the report of the Commission's judgment to Congress was an essential requirement, based on the ICC Act, for the United States to be "discharged of any claim" including the claim that the Western Shoshones still own the unsettled land within the boundaries described in the 1863 Treaty of Ruby Valley. However, the Court of Claims did not address, as a factual matter, whether the Indian Claims Commission had filed, as required by statute, its report with Congress in the Western Shoshone case.

In U.S. v. Dann (572 F. 2d 222 (1978), the Ninth Circuit Court of Appeals pointed out that, "Claims before the ICC proceeded in three steps: decision whether the claimant Indians had ever had title to the land for which they are seeking compensation; establishment of the value of the lands claimed to have been taken as of the time of taking; and a determination of any offsets against the Indians by the Government."

The Ninth Circuit Court of Appeals further said that the 1962 order of the ICC in the Western Shoshone case "is not deemed a final judgment within the meaning of the ICC Act. 'Finality' for this purpose does not attach until the Commission has filed its report with Congress and the Indians have actually been paid the compensation owed them." (p. 226) (emphasis added). Importantly, the Ninth Circuit did not address, as a factual matter, whether the Indian Claims Commission had ever filed "its report with Congress" in the Western Shoshone case.

The U.S. government's brief, filed with the Supreme Court in U.S. v. Dann (470 U.S., 1984), reads in part as follows:

"STATUTE INVOLVED

Section 22 of the Indian Claims Commission Act, ch. 959, 60 Stat. 1055, 25 U.S.C. (1976 ed.) 70u n1 provides:

(a) When the report of the commission determining any claimant to be entitled to recover has been filed with Congress, such report shall have the effect of a final judgment of the Court of Claims, and there is authorized to be appropriated such sums as are necessary to pay the final determination of the Commission."

The above reference to "final determination" in the U.S. government's brief is defined in Section 19 of the ICC Act, which reads as follows:

The final determination of the Commission shall be in writing, shall be filed with its clerk, and shall include 1) its findings of the facts upon which its conclusions are based; 2) a statement (a) whether there are any just grounds for relief of the claimant and, if so, the amount thereof; b) whether there are any allowable offsets, counterclaims, or other deductions, and, if so, the amount thereof; and (3) a statement for its reasons for its findings and conclusions.

And, as noted above, the Commission's final determination was to be included in its report to Congress.

In the 1985 the Supreme Court noted in U.S. v. Dann:

The Indian Claims Commission Act had two purposes. The "chief

purpose
of the [Act was] to dispose of the Indian claims problem with finality." H.R.
Rep. No. 1466, 79th Cong., 1st Sess., 10 (1945). This purpose [of finality]
was effected the language of Section 22(a): "When the report of the
Commission determining any claimant to be entitled to recover has been filed with Congress, such report shall have the effect of a final judgment of the Court of Claims…." Section 22(a) also states that the "payment of any claim…shall be a full discharge of the United States of all claims and demands touching any of the matters involved in the controversy." (p. 45) (emphasis added).

According to the Supreme Court's reading of Section 22(a), the Commission's filing of a report with Congress is one of two ingredients necessary to "effect" [achieve or accomplish] finality in a given Indian Claims Commission case, payment being the second ingredient.

Notably, although it mentioned the reporting requirement of the ICC Act, the Court never did address, as a factual matter, the specific question of whether the Commission had actually filed its report with Congress in the Western Shoshone case.

Instead, the Court limited itself in U.S. v. Dann to only the second ingredient of "finality" in an Indian Claims Commission case, namely, the legal issue of whether payment had been made to the Western Shoshone Indians pursuant to Section 22(a) of the ICC Act.

The Court was clearly aware that the Commission's report with Congress was an essential and statutorily required aspect of "finality" in any given Indian Claims Commission case. Thus, the Court's failure to address, as a factual matter, the question of whether the Commission had indeed filed such a report with Congress in the Western Shoshone case, is presumptive that the Court had not discovered at the time of its ruling in U.S. v. Dann that the Commission never filed its report with Congress.

Conclusion

The Final Report of the ICC tells us for a certainty that the Indian Claims Commission failed to fulfill the reporting requirement of Section 22(a) of the Indian Claims Commission Act in the Western Shoshone case. As already mentioned above, Section 22(a) of the ICC Act specified the two ingredients necessary for the Indian Claims Commission to reach "finality" in any given case. One ingredient was the Commission's report of its final determination and judgment to Congress. The second ingredient was payment to the Indians of the compensation owed to them. The United States Supreme Court in the 1985 ruling U.S. v. Dann failed to discover that the ICC had never been able to fulfill the first reporting ingredient of "finality" in the Western Shoshone case, thus resulting in an error of fact in the decision.

The implications of this new finding are indeed profound. The United States government has relied on the ruling in U.S. v. Dann to contend that the Western Shoshone are barred from raising the question of Western Shoshone title because of the ruling in U.S. v. Dann that the Western Shoshone were paid when the U.S. government paid itself on their behalf. However, such "finality" could only be reached in the Western Shoshone case if the Indian Claims Commission actually did file its report with Congress in the Western Shoshone case, and if the Western Shoshone were paid.

Suppose for a moment that we were willing to agree with the Supreme Court in

U.S. v. Dann (which we are not) that the Western Shoshone were paid when the U.S. Treasury placed monies into an account in the name of the Western Shoshone (as wards of the federal government). This would still leave the reporting requirement of Section 22(a) of the Indian Claims Commission Act unfulfilled. Because the Indian Claims Commission no longer exists, the reporting requirement of the ICC Act will forever remain unfulfilled by the Indian Claims Commission.

Any Western Shoshone monetary distribution bill must rest upon the statutory framework of the Indian Claims Commission Act. Pursuant to the ICC Act, any ICC monetary distribution bill must be premised upon the ICC having entirely completed its work to the point of "finality" as defined by Section 22(a) of the ICC Act. Because the Commission failed to do so in the Western Shoshone case, this means that there is not now and never will be a valid statutory basis for a Western Shoshone monetary distribution bill to be passed by Congress in accordance with the terms of the ICC Act.

The new finding outlined in this Report simply underlines the fact that negotiations will be the only way to resolve the impasse between the United States and the Western Shoshone Nation over disputed lands within the boundaries of the Treaty of Ruby Valley. An effort at negotiations was attempted during the Carter administration, but ultimately failed. Such negotiations must be immediately reopened in order for the United States and the Western Shoshone Nation to come terms with the Western Shoshone title and land rights.

A key starting point of any negotiation between the United States and the Western Shoshone will be the recognition in 1978 by the Ninth Circuit Court of Appeals that, "the title issue in this case was neither actually litigated nor actually decided in the proceedings before the ICC." (United States v. Dann, 572 F. 2d 222, 226). The United States government has been avoiding good faith negotiations with the Western Shoshone people by arguing that "finality" has been reached in the Western Shoshone case. By revealing that the Indian Claims Commission did not reach "finality" in the Western Shoshone case, the Commission's 1979 "Final Report" also reveals that the Western Shoshone title question still remains an open question.

Furthermore, in 1986, the U.S. District Court for the District of Nevada observed that, "the [U.S.] government has admitted that the 1863 Treaty of Ruby Valley is in full force and effect." (13 ILR 3158) As the supreme Law of the land pursuant to Article VI of the United States Constitution, the Ruby Valley Treaty ought to serve as an essential part of the basis of and framework for such negotiations between the United States and the Western Shoshone Nation.

We would like to remind the reader that on August 1, 1946, Secretary of Interior Krug wrote a letter to President Truman, recommending that the president sign the Indian Claims Commission Act into law. Krug told President Truman that that the bill had "international repercussions," and would come to be "viewed as a touchstone of the sincerity of our national professions of fair and honorable dealings toward little nations." (emphasis added) (Legislative History of the Indian Claims Commission Act of 1946, 1976, Clearwater Publishing Co.) The new finding revealed by this Report shows that United States now has the opportunity to demonstrate to the world community its willingness and its ability to engage in "fair and honorable dealings" with the Western Shoshone nation through good faith negotiations.

In a press release dated August 13, 1946, President Truman said that the Indian Claims Commission Act represented an effort to "remove a lingering discrimination against our First Americans" in order "to vindicate their property rights and contracts [e.g., treaties] in the courts against

violations by the Federal Government itself." What makes Truman's words ironic is the way that the United States has for over thirty years refused to allow the Western Shoshone people to "vindicate their property rights" as a nation of people, and their treaty "contract" with the United States that describes the Western Shoshone national boundaries.

President Truman further said of the Indian Claims Commission Act: "This bill makes perfectly clear what many men and women, here and abroad, have failed to recognize, that in our transactions with the Indian tribes, we have at least since the Northwest Ordinance of 1787 set for ourselves the standard of fair and honorable dealings, pledging respect for all Indian property rights." May this pledge on the part of the U.S. government become the basis for the negotiations between the Western Shoshone Nation and the United States.

Finally, we end this Report with the following recommendations:

1) That the Senate Committee on Indian Affairs hold hearings on the slip shod manner in which the Indian Claims Commission dealt with Western Shoshone land rights.

2) That the Senate Committee on Indian Affairs not allow any Western Shoshone monetary distribution bill to be reintroduced during the upcoming congressional session for lack of a valid statutory basis for such a bill.

3) That the United States enter into negations with the Western Shoshone Nation in order to come up with a comprehensive and meaningful solution to the continuing dispute between the two nations over lands within the boundaries of the 1863 Treaty of Ruby Valley.